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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION AND THE AMERICAN IRON AND STEEL INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amicus curiae the American Forest & Paper Association, Inc. is a non-profit trade association whose member companies grow, harvest, and process wood and wood fiber and manufacture pulp, paper, and paperboard products and solid wood products. AF&PA member companies account for over 8% of total U.S. manufacturing output. [1] *Amicus curiae* the

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[1] Counsel for *amici* authored this brief in its entirety, and no one other than the listed *amici* contributed to the cost of preparing and submitting this brief.

American Iron and Steel Institute is a non-profit trade association whose members produce approximately 77% of the basic steel manufactured in this country.

The *amici* represent companies which own or lease extensive tracts of land used for large manufacturing facilities or for the production of timber, including approximately 71 million acres of forest land. These lands contain many isolated ponds or other areas where topographical depressions from time-to-time collect rainfall runoff. The *amici* also represent companies which own and operate hundreds of isolated ponds or man-made surface impoundments, used as water storage, treatment, or evaporation basins; cooling water or fire protection water ponds; log storage ponds; surface runoff sedimentation ponds; and the like.

If every such isolated, low-lying area and every such surface impoundment was considered "waters of the United States" subject to regulation under the Clean Water Act merely because it is actually or potentially used by migratory birds, then these companies could find that their intended use of their lands and the continued operation of their facilities would be constrained by U.S. Army Corps of Engineers and U.S. Environmental Protection Agency permit requirements.

Thus, the *amici* have a direct and immediate interest in the issues presented in this case, which concern fundamental aspects of how the activities of their member companies may be subject to federal regulation and whether they can reasonably know what conduct is prohibited. Moreover, since the definition of "waters of the United States" approved by the Seventh Circuit is so broad and so vague that it could apply to almost any property, almost any of the *amici's* members (and countless other landowners) could be

subjected to harsh civil or criminal penalties if the government chooses to assert that the member's particular property and activity fall under Clean Water Act jurisdiction.

Amici therefore can help provide this Court with a broader perspective on the pernicious effects that the Seventh Circuit's overextension of Clean Water Act jurisdiction could have on manufacturing and forestry throughout the country.[2]

SUMMARY OF ARGUMENT

This case concerns the central issue in determining the applicability of virtually all of the regulatory controls imposed by the federal Clean Water Act ("CWA"). If an area is considered to be a "navigable water," defined to mean a "water of the United States" in CWA section 502(7), 33 U.S.C. § 1362(7), then the U.S. Army Corps of Engineers (the "Corps") has authority to restrict or prohibit the discharge of dredged or fill materials into that area, under CWA section 404, 33 U.S.C. § 1344. The term "water of the United States" also delineates U.S. Environmental Protection Agency ("EPA") jurisdiction to restrict or prohibit point source discharges of pollutants under CWA section 402, 33 U.S.C. § 1342.

The definition of "waters of the United States" advanced by the Corps and accepted by the Seventh Circuit in the case below is so broad that it could be used to impose these Corps and EPA permitting requirements on the use of practically any occasionally

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2 Pursuant to Rule 37 of the Rules of this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court.

wet area of land. The effect of the Seventh Circuit ruling is that Clean Water Act permitting requirements could be applied to vast additional areas of the country, beyond what Congress envisioned, beyond the limits of the Commerce Clause, and beyond the "bounds of reason." *See Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995).

Under the interpretation of the Clean Water Act challenged here, potentially regulated companies and individuals have only vague guidance as to whether they are subject to the Act, but they are subject to severe sanctions if they guess wrong. Yet even the Corps and EPA have been unable to apply the "migratory bird rule" consistently, even as to a single property. Thus, the rule is not only beyond the authority granted in the Clean Water Act and beyond the limitations of the Commerce Clause, it is impermissibly vague, as well.

ARGUMENT

I. DESIGNATION AS "WATERS OF THE UNITED STATES" IMPOSES SUBSTANTIAL CONSTRAINTS ON THE USE OF PROPERTY.

The regulatory authorities created by the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA"), apply to "navigable waters," which the CWA in turn defines as "waters of the United States." CWA section 502(7), 33 U.S.C. § 1362(7). This Court has made clear that Congress intended to control not only discharges into traditional navigable-in-fact waters, but also any other discharges into areas that might affect those waters (such as tributaries or adjacent wetlands). *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33, 135-38 (1985).

The instant case involves an issue which is not explicitly discussed in the legislative history and has not been consistently resolved by the courts—whether the CWA also extends to isolated waters, whether naturally occurring or man-made, that do not have such a connection to traditional navigable waters.[3] The Court expressly reserved that issue in *Riverside Bayview Homes*, 474 U.S. at 131 n.8. The Seventh Circuit has now concluded that the Clean Water Act can apply to an isolated water or wetland,[4] if it is used as habitat by migratory birds, without any reference to legislative history or to any judicial decision involving a wetland or "other water" without a connection to navigable-in-fact waters. *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 191 F.3d 845, 851 (7th Cir. 1999) ("SWANCC"). The Ninth Circuit implicitly reached the same conclusion,

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3 There is nothing in the objectives of CWA § 101(a), 33 U.S.C. § 1251(a), nor in the legislative history of the CWA, that suggests Congress intended to address areas which only occasionally collect water (or man-made excavations), if those areas have no potential impact upon traditional navigable waters or even on any other surface water body. Rather, the legislative history demonstrates that Congress was concerned about waters with some connection to and potential impact upon other surface waters. In discussing the geographic scope of the Clean Water Act, Congress spoke of a need to control the discharge of pollutants at its source because "water moves in hydrologic cycles," S. Rep. No. 92-414, 92nd Cong., 1st Sess. 77 (1971), but concluded that controls therefore must be applied "to the navigable waters, portions thereof, and their tributaries." *Id.*

4 The Corps defines "waters of the United States" to include "wetlands." 33 C.F.R. § 328.3(a) (1999).

again without citing relevant legislative history or case law, while the Fourth Circuit has determined more broadly that such isolated waters are beyond the bounds of the Clean Water Act. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) ("*Leslie Salt I*"), *cert. denied*, 498 U.S. 1126 (1991); *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

This tenuous link between use or potential use by migratory birds and regulation under the Clean Water Act would have far-reaching consequences. If an isolated, low-lying area or a man-made pond is determined to constitute a "water of the United States," then the CWA and implementing regulations impose severe limitations on a landowner's use of that area. Under CWA section 404, 33 U.S.C. § 1344, a U.S. Army Corps of Engineers ("Corps") permit is required in most instances prior to discharging dredged or fill materials into a "water of the United States." Under the Corps regulations, this means that a permit may be required for dredging of the area; placing fill for the construction of structures, site development, or impoundments; grading or road construction; mechanically clearing the land; or even cutting a ditch for the purpose of draining an area. *See* 33 C.F.R. §§ 323.2-323.4 (1999) and, *e.g.*, *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). *See also* 57 Fed. Reg. 26,894, 26,896 (1992). Various forestry or farming practices may involve activities which, if conducted on land considered to be "waters of the United States," would constitute the discharge of dredged or fill material, particularly during road construction, harvesting, and replanting.[5]

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5 Although CWA § 404(f)(1), 33 U.S.C. § 1344(f)(1), contains exemptions from Corps permitting requirements for certain forestry or farming activities conducted in accordance with statutory criteria, those exemptions are limited by their terms and by CWA § 404(f)(2) and Corps regulations and guidance. *See* 33 C.F.R. § 323.4 (1999).

A permit to use the land as desired may be denied outright, as it was in the instant case, or it may be issued only after the landowner agrees to redesgn the project or engage in costly compensatory "mitigation" measures. *See, e.g., 40 C.F.R. § 230.10(a), (d) (1999); EPA and Dept. of Defense "Memorandum of Agreement Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines," 54 Fed. Reg. 51,319 (1989);* 60 Fed. Reg. 58,605 (1995). An owner of land determined by the Corps or EPA to be a "water of the United States" is not only stripped of the right to freely develop, landscape or cultivate the area, but may also be prevented from securing bank loans or obtaining title insurance for the property or otherwise managing the property as a productive asset. *See, e.g., Rueth v. EPA,* 13 F.3d 227, 230 (7th Cir. 1993) (noting the substantial curtailment of a landowner's property interest after EPA's exercise of "water of the United States" jurisdiction).

The effect of a broad definition of "waters of the United States" extends even further, however. Under CWA sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, a permit from EPA or a delegated state is required for any "discharge of a pollutant," which in turn is defined as "any addition of any pollutant to navigable waters from a point source."[6] The

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6 CWA §. 502(12), 33 U.S.C. § 1362(12). "Pollutant" is defined very broadly in CWA § 502(6), 33 U.S.C. § 1362(6), encompassing a wide range of both process and non-process water discharges.

regulatory definition of "waters of the United States" promulgated by the U.S. Environmental Protection Agency ("EPA"), which administers the pollutant discharge permitting program, is virtually identical to the Corps' definition of the same term which was applied by the Seventh Circuit in the case below.[7] Thus, an area determined to be a "water of the United States" is not only subject to Corps permitting requirements for activities in the area that may discharge dredged or fill material but also is subject to EPA CWA section 402 discharge permit requirements for any point source discharge of "pollutants" to the area.[8]

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7 *Cf.* 40 C.F.R. § 122.2 (1999) *with* 33 C.F.R. § 328.3(a) (1999). For additional explanation of the roles of EPA and the Corps under the CWA, *see* Memorandum of Agreement Between the Dept. of the Army and the Environmental Protection Agency concerning Federal Enforcement for the Section 404 Program of the Clean Water Act, Jan. 19, 1989, *reprinted in* 19 Env. L. Rep. 35183 and *United States v. Mills*, 817 F. Supp. 1546, 1551 (N.D. Fla. 1993), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112 (1995).

8 *See, e.g., Laguna Gatuna, Inc. v. Browner, et al.*, 58 F.3d 564, 565 (10th Cir. 1995), *cert. denied* 516 U.S. 1071 (1996) (EPA issued cease and desist order to company that disposed of wastewater without a discharge permit into a privately-owned sinkhole, which, by EPA's own admission, "was not hydrologically connected to other waters and there were no recreational, industrial or other uses that could affect interstate commerce," based solely on the presence of some dead migratory birds near the sinkhole).

II. THE DEFINITION OF "WATERS OF THE UNITED STATES" ADVOCATED BY THE CORPS PLACES VIRTUALLY NO LIMITS ON CLEAN WATER ACT JURISDICTION.

The Corps has defined "waters of the United States" so broadly as to include any isolated wetland or "other water" with no connection to navigable-in-fact waters. 33 C.F.R. § 328.3(a) (1999); *see also* EPA definition at 40 C.F.R. § 122.2 (1999). In fact, the Corps and EPA assert, and some courts have agreed, that "waters of the United States" may include isolated areas that are only seasonally or ephemerally wet. *See, e.g., Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). Rainwater collecting on dry land for a few days may be enough to create a regulated wetland. *See Leslie Salt Co. v. United States*, 700 F. Supp. 476, 487 (N.D. Cal. 1988), *rev'd on other grounds*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991). The term also can encompass man-made ponds or impoundments created out of dry land, such as the ponds used for a multitude of industrial purposes.[9] Moreover, both the Corps (as demonstrated

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9 *See, e.g., Leslie Salt I*, 896 F.2d at 358-60. EPA and the Corps do exempt certain waste treatment ponds from the definition of "waters of the United States," but even that exemption is limited and has been applied inconsistently. 40 C.F.R. § 122.2 and 33 C.F.R. § 328.3(a). For example, EPA has argued that its "treatment pond exception is simply notice to polluters that it will not generally regulate" discharges into waste treatment ponds, "not a promise that it never will." *Texas Municipal Power Agency v. EPA*, 836 F.2d 1482, 1488 (5th Cir. 1988). EPA also has argued in some instances that its waste treatment exclusion does not apply to any system constructed in an area that previously fell within EPA's overly broad definition of "waters of the United

by the instant case) and EPA claim that such "waters" fall within their CWA jurisdiction even if the only putative connection to interstate commerce is that the area is or could potentially be used as habitat by migratory birds. *See, e.g., Hoffman Homes, Inc. v. Administrator, U.S. Environmental Protection Agency,* 999 F.2d 256, 261 (7th Cir. 1993).

Land can be dry the vast majority of time and still be considered a "water of the United States." For example, a farm can be considered a wetland, and therefore a "water of the United States," if it is inundated or saturated to within one foot of the surface for just 15 days during the growing season; other types of topographic features need only be inundated or saturated seven days a year. *United States v. Hallmark Construction Company*, 30 F. Supp. 2d 1033, 1038, 1040 (N.D. Ill. 1998); Corps of Engineers Wetlands Delineation Manual, p.38 (Jan. 1987). The salt crystallizers at issue in the *Leslie Salt* cases were located in an area that had been pasture land in the past, 896 F.2d at 355, and were "constructed on dry land." *Leslie Salt,* 700 F. Supp. at 480..[10] The

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States." *See West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991) (Table), 33 E.R.C. 1353.

10 The district court clearly rejected the Corps' assertion that the former salt crystallizers constituted "other waters" or "wetlands" because of occasional "ponding of water on otherwise dry land." 700 F. Supp. at 485. "After a rain that is heavy or long enough, any soil will become temporarily saturated. . . . [I]t is simply not enough that rain water collect on property for a few days for that property to become a water of the United States." *Id.* at 487. Yet the Ninth Circuit concluded in *Leslie Salt I* that the district court's findings were irrelevant for a

temporarily wet areas at issue there "have no hydrological connection to any other body of water," and "for much of the year they do not even exist." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395 (9th Cir. 1995) ("Leslie Salt II").

Consequently, under this definition, almost any "water" (including areas that are only occasionally wet or soggy) could be determined by the Corps or EPA to be within their regulatory jurisdiction. Millions of acres of *land*[11] and millions of landowners are potentially subject to restrictions under the CWA as a result of these agencies' definitions of "waters of the United States."

The Corps' interpretation at issue in this case, that an isolated "other water" falls under the CWA if it is "or would be" used as "habitat" by migratory birds, 51 Fed. Reg. 41,206, 41,217 (1986), is so broad that in practice it represents no limitation at all on Corps jurisdiction, placing virtually all areas containing water, or that are even occasionally saturated, within

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determination of the Corps' jurisdiction over "waters of the United States." 896 F.2d at 360.

11 Under present wetlands determination policy, approximately 111 million acres of land in the United States could be affected as regulated wetlands. *Water Pollution*, 22 Env't Rep. (BNA) 2169, 2194, January 24, 1992. Millions of additional acres of normally dry washes, playas, and other areas are also potentially regulated as "waters of the U.S.," as in *Quivira Mining, supra*. The Corps conducted a study that identified over 8 million isolated depressions of less than one-half acre that could be considered jurisdictional wetlands under the "migratory bird test." U.S. Army Corps of Engineers, *1995 Wetlands Delineation Field Evaluation Forms* (June 1995).

the category of "waters of the United States." There is no requirement that the use by migratory birds be "substantial," although it is clear that the commerce power does not reach activity which merely "affects" interstate commerce, but rather there must instead be a showing that "the regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). In fact, it is sufficient in the Corps' view if the area merely has the potential to be used by migratory birds. 51 Fed. Reg. at 41,217; *Cargill, Inc. v. United States*, 516 U.S. 955, 958 (1995) (Thomas, J., dissenting from denial of certiorari). [12] There is nothing in the record to suggest that any use of an area by migratory birds, no matter how insignificant, has a substantial impact on interstate commerce. The mere potential for such use has no effect at all, much less the substantial effect required by this Court's jurisprudence.

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12 While the court below did not believe the issue of *potential* effect was before it (191 F.3d at 852), the "migratory bird rule" that was before it explicitly addresses "waters" that "would be used" by migratory birds, and, in fact, the Corps has already asserted that its jurisdiction can be founded on such a speculative basis. *See, e.g., United States v. Wilson*, 133 F.3d at 257; *Leslie Salt*, 700 F. Supp. at 485 ("The Corps' witnesses would extend that jurisdiction not only to actual use by migratory birds, but also to potential use."); *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989) (Table) (reported at 20 Envtl. L. Rep. 20008) (Corps directive that "all waterbodies which are or reasonably could be used by migratory birds are waters of the United States"); *Hoffman Homes*, 999 F.2d at 259 (enforcement action based on "the theoretical possibility" of use by migratory birds); *id.* at 261.

The Corps' interpretation does not even require that migratory *water*fowl use or potentially use the site; in fact, the Corps has asserted jurisdiction over property because of its use by woodpeckers and songbirds. *See Tabb Lakes*, 715 F. Supp. at 728.[13] In short, it is difficult to imagine an area of land that could not be considered "waters of the United States" under this expansive, though not congressionally foreseen, definition.

There are somewhere between 2.5 and 6 billion birds in the United States, two-thirds of which migrate. *SWANCC*, 191 F.3d at 850. *See also* 50 C.F.R. § 10.13 (1999) (U.S. Fish and Wildlife Service's list of about 1000 species of migratory birds, including such common birds as pigeons, starlings, sparrows, and wrens.) The Seventh Circuit acknowledged that "[v]irtually any body of water could serve as temporary habitat for at least some of these birds," but somehow took comfort in the fact that the "migratory bird rule" addresses "waters" that are or could be used as "habitat." 191 F.3d at 850. While the term "habitat" is not defined in the Corps' rules or interpretation, the court below applied a dictionary definition and concluded that, because the Corps has to "make a factual determination that a particular body of water provides a habitat for migratory birds," the

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13 This Court can take judicial notice of the fact that birds such as woodpeckers and songbirds could make use of practically any undeveloped property, regardless of whether any significant ponding of water occurs there. In fact, the government conceded in oral argument in the *Hoffman Homes* case that "migratory birds would land and drink from a puddle in the median of a highway." *Hoffman Homes, Inc. v. Administrator, U.S. Environmental Protection Agency*, 961 F.2d 1310, 1321 n. 9 (7th Cir. 1992), *vacated* 975 F.2d 1554.

migratory bird rule is limited and does not sweep virtually all "waters" under the CWA. *Id.*

While the theoretical merits of that argument are debatable, the facts are not: the Corps and EPA have applied the migratory bird rule in situations where little or no information about the extent of a bird's use of the "water" as "habitat" was available. In *Laguna Gatuna*, EPA issued a cease and desist order based on its observation of a few dead migratory birds near the company's wastewater evaporation pond. 58 F.3d at 565. In *Hallmark Construction*, 30 F. Supp. 2d at 1041-42, the Corps pursued an enforcement action apparently based on the discovery of shotgun shell casings on the parcel and a witness who testified that he might have seen geese near the parcel on one occasion. Clearly the Corps and EPA do not view the term "habitat" as any constraint on their ability to assert that migratory bird use of whatever nature and duration renders an area subject to CWA jurisdiction.

The Corps does not even pretend to require that any use by migratory birds be "substantial." It should be obvious from the incredibly broad reach of the Corps' and EPA's view of "waters of the United States" that many areas over which they assert jurisdiction could be modified or even eliminated without any perceptible effect on interstate commerce. In *Leslie Salt*, for example, it seems clear that the impact on migratory birds from modifying or filling the company's property could not have been substantial -- the areas in question collect rainwater for only "a few days," 700 F. Supp. at 487, and yet are adjacent to the San Francisco Bay National Wildlife Refuge and close to the bay itself. 55 F.3d 1390-91. Moreover, since the government asserts that "waters of the United States" can include man-made water bodies (such as the pits from gravel mining in the instant case or the salt crystallizers in *Leslie Salt*), which are not even a natural habitat for migratory birds, it is hard to see

how such water bodies that did not previously exist could have a significant impact on the natural migration of birds. In any event, the Corps and EPA have simply made no regulatory findings to support the conclusion that the isolated natural or man-made waters and wetlands in this country have a substantial impact on interstate commerce, either individually or cumulatively.

III. The CORPS' INTERPRETATION OF "WATERS OF THE UNITED STATES" PROVIDES AN IMPERMISSIBLY VAGUE STANDARD FOR ASSESSING HARSH CIVIL AND CRIMINAL PENALTIES.

While the cost and regulatory burden imposed by the Corps' and the Seventh Circuit's expansive definition of "waters of the United States" represent a tremendous potential impact on *amici* and other businesses, municipalities, and private citizens, the impact is greatly magnified by the harsh civil and criminal penalties available under the Clean Water Act. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides for a civil penalty of up to $27,500 per day for a violation of the prohibition on unpermitted discharges,[14] while CWA section 309(c), 33 U.S.C. § 1319(c), could impose a criminal penalty of up to $25,000 per day of violation or imprisonment for not more than one year, or both, for even negligent violations.

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[14] The CWA was amended in 1987 to allow for civil penalties of up to $25,000 per day, Pub. L. No. 100-4, 101 Stat. 7, but as a result of the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461 as amended by 31 U.S.C. § 3701, that amount has been increased to $27,500.

These penalties are not just theoretical: the United States has been vigorously prosecuting companies and individuals for placing fill material in areas which the government considers wetlands or other "waters of the United States."[15] In many instances, these enforcement actions are against individuals or companies that did not think their land constituted "waters of the United States." See, e.g., *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992), *cert. denied* 506 U.S. 875 (1992).

In fact, this Court denied a petition for a *writ of certiorari* in a case where the district court noted "the disturbing implications of the expansive" Corps definition of "waters of the United States," which "mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of 'discharging pollutants into navigable *waters* of the United States.'" *United States v. Mills*, 817 F. Supp. at 1548 (emphasis in original). Nevertheless in that case a father and son were each sentenced to 21 months incarceration for placing fill material on a waterfront lot that "does not have the appearance of what most lay people think of as a 'wetland.'" *Id.*

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15 *See, e.g., United States v. Pozsgai*, Cr. No. 8800450-01, (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3rd Cir. 1990) (Table), *cert. denied*, 498 U.S. 812 (1990) (individual sentenced to three years imprisonment and fined $200,000 for filling a wetlands without a permit); *United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) (company fined $100,000 and its senior vice-president fined $10,000 and given a suspended six-month sentence with one year probation for filling in wetlands without a permit).

In addition to these serious penalties, the Corps or EPA may require companies to restore wetlands following a determination by the Corps or EPA that a piece of property is a "water of the United States," *see, e.g., United States v. Cumberland Farms of Conn.*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); and in fact EPA "enforcement efforts . . . generally seek removal of the fill and restoration of the site."[16]

The companies and landowners faced with these severe potential penalties, however, have been provided few, if any, objective criteria by which to determine whether the use of their land requires a Corps or EPA permit. Companies and individuals today are thus faced with a situation even more egregious than that which the district court found "disturbing" in *Mills*. While the lot in that case had no standing water and did not "appear to be" a wetland or a marsh, swamp, or bog, at least it was located adjacent to a bay and had a depression that sometimes carried rainwater runoff from inland to the bay. 817 F. Supp. at 158. After the lower court decision here, though, a felony conviction could be based on activities in an area that is not near any surface water body and is either excavated in dry land or is a depression that is only temporarily wet after rainfall, so long as the area might sometime be used by some type of migratory bird.

Simply put, the regulated community cannot ascertain the boundaries of Clean Water Act jurisdiction under the rule stated by the Corps and EPA

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16 EPA Report to Congress on Clean Water Act Enforcement Mechanisms, pursuant to P.L. 100-4, Section 314(b), May 11, 1990 at 22; *see also United States v Krilich*, 209 F.3d 968, 970 (7th Cir. 2000).

and approved by the courts in the *SWANCC*, *Leslie Salt*, and *Hoffman Homes* decisions. Such a nebulous and subjective standard for determining the applicability of the stringent civil and criminal penalties at issue here must be unconstitutionally vague. *See, e.g., Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) (statute which "forbids . . . an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law."); *Kolender v. Lawson*, 461 U.S. 352 (1983) (statute is unconstitutionally vague because it fails to describe with particularity what is required, encouraging arbitrary and discriminatory enforcement).[17] The problem is aggravated by the fact that, at least according to the Ninth Circuit in *Leslie Salt II*, anyone who guesses wrong about the application of these uncertain and *ad hoc* criteria to his land is subject to a *mandatory* civil penalty. 55 F.3d at 1396-97.

EPA has even acknowledged that its determinations regarding wetlands and "waters of the United States" are undertaken on a case-by-case and often inconsistent basis. For example, in the preamble to its National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, EPA Region VI set out a list of factors to be considered in determining whether certain "playas" are "waters of the United States." 58 Fed. Reg. 7610, 7621 (1993). EPA also stated, however, that the factors "are neither exclusive nor regulatory; they are simply examples of the sort of factors EPA will

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17 This situation also argues strongly for a narrow construction of "waters of the United States" under the rule of lenity. *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

probably apply in making individual determinations." *Id.* (emphasis added). EPA adds that "[t]here are various types of commerce which may be affected by the degradation of many playa lakes, but EPA has to date asserted jurisdiction over them only on a case-by-case basis, generally in the context of enforcement actions." *Id.* at 7620. Similarly, courts have recognized the substantial technical inconsistencies associated with wetlands determinations. In *United States v. Ellen*, for example, the court addressed the delineation of "waters of the United States" by EPA and the Corps, and recognized that "[t]he absence of a uniform federal methodology resulted in inconsistent wetlands determinations for similar areas."[18]

Both EPA and the Corps have acknowledged the significant uncertainty accompanying decisions to assert CWA jurisdiction over wetlands.[19] In its 1990

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18 961 F.2d 462, 465 (4th Cir. 1992) (notwithstanding inconsistencies in wetland determinations, defendant convicted of five felony counts for filling wetlands after a cease and desist order from the Corps).

19 Since 1987, EPA and the Corps have employed three distinct wetlands delineation manuals for the identification of regulated wetlands. *See, e.g., Ellen*, 961 F.2d at 464-65; Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer*, 73 Neb. L. Rev. 163, 172-73 (1994). This dispute over the appropriate manual for use in wetlands determinations involves more than mere procedural flip-flopping. Which manual is used to identify and delineate wetlands can make a great difference in the amount of land considered to be wetlands. Lamunyon, *supra*, 73 Neb. L. Rev. at 173-74; National Research Council, *Wetlands: Characteristics and Boundaries* (1995) at 77-78 ("NRC Report").

Report to Congress, *supra* n. 16, EPA stated that: "The agencies' differing interpretations of issues related to the geographic jurisdiction of section 404 or whether a particular activity is regulated or has been authorized, have hampered section 404 enforcement." *Id.* at 20; *see also* 65 Fed. Reg. 21, 292 (2000); 58 Fed. Reg. 4995 (1993); 56 Fed. Reg. 40,446, 40,449 (1991). A committee of the U.S. House of Representatives also observed that "EPA has not consistently applied the regulatory definition of navigable waters, creating uncertainty for the regulated community." House Comm. on Transp. and Infrastructure, H.R. Rep. No. 112, 104th Cong., 1st Sess. 147 (1995).

The Corps and EPA cannot even agree on the application of their definition of "waters of the United States" to a single property. In the instant case, the Corps twice told SWANCC that its land was not subject to CWA jurisdiction, after an on-site inspection, before ultimately concluding that it was. 191 F.3d at 848. In *Laguna Gatuna*, EPA sent the company a letter declaring that its sinkhole was not a "water of the United States," but the Agency reversed itself later. 58 F.3d at 565. In *United States v. Wilson*, the Corps obtained felony convictions of a company and its CEO for filling an area that the Corps had previously concluded met the hydrologic definition of "wetland" but was not clearly within the definition of "waters of the United States." 133 F.3d at 251.[20]

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20 *See also Avoyelles Sportsmen's League*, 715 F.2d at 901-903 (Corps consultant determined 35% of parcel was wetlands, EPA concluded the proportion was about 80%, and the U.S. Fish & Wildlife Service asserted all of it was wetlands).

If any area of land that is wet for a minimal amount of time can be brought within CWA jurisdiction merely because it "may provide habitat to migratory birds," then countless landowners are in jeopardy of violating the CWA by filling or conducting work in an area they had no reason to believe was a "water of the United States."[21] Landowners should not be subjected to crushing sanctions for guessing wrong about the nature of present or future bird use of their property—especially when not even the Corps or EPA can get it straight.[22]

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21 EPA has acknowledged that its broad and uncertain assertion of CWA jurisdiction may result in EPA bringing an enforcement action for discharges to a water body that the discharger regarded as its own wastewater treatment system. National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610, 7620-21 (1993). As a result, "companies and individuals today live under a very real fear that cooling ponds and surface impoundments they are using for waste treatment may suddenly be determined to be navigable waters, and subject to the full panoply of Clean Water Act requirements." H. R. Rep. No. 112, 104th Cong., 2nd Sess. 158 (1995).

22 As an indication of the pure arbitrariness of the application of the migratory bird rule: the dissent in the Fourth Circuit *Tabb Lakes* decision suggests that use by ducks and geese may be enough, but that use by robins and finches may not. 20 Envtl. L. Rep. 20008 at n.2 (4th Cir. 1989)

CONCLUSION

The Corps of Engineers' assertion that "waters of the United States" includes isolated lands which are subject to only occasional saturation or ponding, or artificial ponds created on normally dry land, solely because those areas are or could be used by migratory birds, is so broad as to subject huge additional areas of this country to Corps (and EPA) permitting requirements. There is no reason to believe that Congress intended Clean Water Act jurisdiction to extend to the vast areas of the country where water may pond or soils may be saturated temporarily after rainfall or snowmelt on normally dry ground. As acknowledged even by the Ninth Circuit in *Leslie Salt II*, "[c]learly the Act fails to mention isolated wetlands. And, to the extent it is relevant, neither does the Act's legislative history from 1972 and 1977." 55 F.3d at 1394. Even if it did, however, the Constitution would still require a substantial effect on interstate commerce to authorize such action by Congress.

Potential or even actual use as habitat by migratory birds does not provide the required substantial effect on interstate commerce. In fact, the government itself has conceded that almost any puddle could, under its theory, be used by migratory birds and therefore subject to CWA jurisdiction. The government can offer no indication that Congress intended to cast the regulatory net that wide, even if the Constitution allows it. Nor is there any indication that the Corps assessed the impact on interstate commerce of these myriad isolated "waters," much less determined that their use or non-use by migratory birds would have the "substantial" effect on interstate commerce that this Court's jurisprudence requires.

Moreover, the migratory bird rule provides an impermissibly vague and subjective standard for the

crucial determination of whether Clean Water Act restrictions apply. Countless businesses, municipalities, and private landowners should not be faced with severe fines and penalties under the CWA just because their land may at some time be wet and a migratory bird may land there.

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